In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 791

MARSHALL NEAL, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 138-149) is reported at 203 F. 2d 111.

JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1953 (R. 149). On April 21, 1953, Mr. Justice Jackson extended the time for filing a petition for a writ of certiorari until May 11, 1953 (R. 162), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also rule 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner's waiver of his claim to exemption as a conscientious objector was illegally induced.

2. Whether a letter from petitioner to his local draft board at Houston, Texas, should have been interpreted as a request for a personal appearance in spite of the fact that petitioner stated in the letter that he was unable to come to Houston but would like to be heard at Austin, where he then resided.

3. Whether the local board, having already sent petitioner an order to report for induction, was justified in declining to reopen petitioner's case.

4. Whether there was a basis in fact for the local board's rejection of petitioner's claim to exemption as a minister.

5. Whether the trial court erred in denying petitioner's motion for production of a report made by the F.B.I. agent following the interview at which petitioner waived his conscientious objector claim.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Section 6(j), Selective Service Act of 1948, 50 U.S.C. App., Supp. IV, 456(j), provided in pertinent part:

> * * * Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the

appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

Section 6(g), Selective Service Act of 1948, 50 U.S.C. App., Supp. IV, 456(g), provided:

Regular or duly ordained ministers of religion, as defined in this title, and students pre-

paring for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been preenrolled, shall be exempt from training and service (but not from registration) under this title.

Section 16(g)(3), Selective Service Act of 1948, 50 U.S.C. App., Supp. IV, 466(g)(3), provided:

> The term "regular or duly ordained minister of religion" does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization.

Selective Service Regulations 32 C.F.R. 1624.1 (a) provides:

> *Opportunity to appear in person.* (a) Every registrant, after his classification is determined by the local board * * *, shall have an opportunity to appear in person before the

> member or members of the local board designated for the purpose if he files a written request therefor within ten days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended * * *.

Selective Service Regulations 32 C.F.R. 1625.2 provides:

> *When registrant's classification may be reopened and considered anew.* The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, * * * if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

STATEMENT

In a one-count indictment filed in the United States District Court for the Western District of

Texas on May 7, 1951, petitioner was charged with having knowingly refused service in the armed forces of the United States, in violation of 50 U.S.C. App., Supp. V, 462(a) (R. 1-2). Thereafter, on January 29, 1952, following a trial without a jury, petitioner was sentenced to imprisonment for a period of three years (R. 123). On appeal to the Court of Appeals for the Fifth Circuit, the judgment of conviction was unanimously affirmed (R. 149).

Petitioner registered with his local board in Houston, Texas, on September 13, 1948 (R. 25). On August 10, 1949, he filed his classification questionnaire in which he stated that he had been a minister of Jehovah's Witnesses since June 6, 1946, that he had been formally ordained by the Watch Tower Bible and Tract Society of Houston, and that in addition to working at the ministry he did secular work (R. 34, 47). After filing his classification questionnaire, petitioner also filed a Special Form for Conscientious Objectors (SSS Form 150), and attached thereto certain papers indicating his conscientious objection to both combatant and noncombatant military service (R. 26, 48-49). On August 22, 1950, he was given a 1-A-O classification (available for noncombatant service) (R. 26). No request was made for a personal appearance, but an appeal was filed on August 29, 1950 (R. 29). The board of appeals for Texas reviewed the file and on September 15, 1950, determined that he was not entitled to a IV-E classification.[1] It then for-

[1] At that time complete deferment from all military service

warded the file to the Department of Justice for an advisory opinion on the conscientious objector claim, in accordance with Selective Service Regulations (32 C.F.R. 1626.25). (R. 30.) However, the Department of Justice never furnished such an opinion, for on or about November 2, 1950, petitioner signed a statement voluntarily withdrawing his conscientious objector claim (R. 50-51, 72-73). Petitioner's selective service file was then returned to the appeal board, from where it was sent back to the local board. The local board reopened the case, and on December 6, 1950, reclassified petitioner 1-A (R. 30). On December 12, 1950, petitioner, who then resided at Austin, Texas, wrote the local board at Houston, as follows:

> I would like to appeal such classification, because of the fact I am an ordained minister of the gospel. I would like very much to appeal in person before the particular draft board in which I am registered with, but because of me living here in Austin, Texas, I am not able to do so. But if there is any ways that can be made for me to appear in person here in Austin I would appreciate it very much. The reason why I would like to make such appearance, so that I can prove to you beyond any future doubt that I am an ordained minister of the gospel. [Deft.'s Ex. 14.]

Due to the impossibility of the Houston board's

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was available to persons demonstrating conscientious opposition to both combatant and noncombatant service. The classification given was IV-E. At the present time, such persons receive I-O (available for civilian work in the national interest) (32 C.F.R. 1622.14).

going to Austin to hear petitioner in person, this letter was interpreted as a request for reopening and appeal. On January 4, 1951, the board voted against reopening (R. 31), and on January 12, 1951, the appeal board upheld the 1-A classification (R. 30).

On January 24, 1951, petitioner wrote a letter to General Hershey in which he stated that he felt that he had been wrongfully induced in November 1950 to surrender his conscientious objector claim by an F.B.I. agent's (Special Agent Burt) representations that he could not claim exemption on both grounds. Thereafter, the file was called in to State Headquarters of the Selective Service System at Austin, and the State Director asked the United States Attorney to check with Burt concerning the alleged false representations at the time the waiver was secured from petitioner. Burt emphatically denied that he had made any such representations. On March 5, 1951, after having reviewed the file and interviewed petitioner in person, the State Director wrote the local board a letter stating in part (R. 32):

> This letter is not a request for the reopening of this registrant's case, but is merely to advise your board that if the registrant can present a case now to you which would show he is a duly ordained minister of religion and "as his regular and customary vocation teaches and preaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization" your board

> could request this headquarters for permission to reopen the case.

On March 7, 1951, petitioner appeared before the local board at Houston and testified concerning his alleged ministry (R. 53-58). At the close of this hearing, the local board telephoned the State Director for advice, and the next day, March 8, the State Director wrote the board, in part, as follows:

> You are advised that, under the limitations of Part 1625.2 of the Regulations, it is the opinion of this Headquarters that your local board has no authority to reopen the case of this registrant unless your board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant has no control.[2]
>
> * * *

The board, following receipt of this letter, voted 5-0 against reopening the case (R. 40). Thereafter, petitioner's file was transferred to Austin and on March 13, 1951, the Austin board notified petitioner to report for induction on March 21, 1951. He reported, but, as stipulated by counsel, refused to be inducted (R. 24).

ARGUMENT

1. Petitioner's contention that the waiver of his conscientious objector claim was illegally obtained and vitiated all subsequent proceedings is based

[2] Selective Service Regulations (32 C.F.R. 1625.2, *supra*, p. 5) provide that when an induction order has issued, the change warranting reopening must have resulted from circumstances beyond the registrant's control. An induction order had issued to petitioner on February 28, 1951 (R. 27).

upon his version of a disputed issue of fact which the trial court resolved against him (Pet. 21-28). At the trial, petitioner testified that the F.B.I. agent who took his statement had first won his confidence, and then had advised him that, while he could not rely on both the conscientious objector and ministerial claims, by signing the waiver he would be able to get a IV-D (minister's) classification (R. 50-51). However, different testimony was given by the agent, who also took the stand. He stated that early in November, 1950, the F.B.I. office in Austin received a communication from the United States Attorney in Houston suggesting that petitioner be interviewed for the purpose of ascertaining whether or not he wished to rely on both his ministerial and his conscientious objector claims to exemption (R. 72). He testified that pursuant to this communication he met petitioner, spoke with him on the subject of his conscientious objector claim, and took from him a written statement withdrawing such claim (*ibid.*). The agent asserted before the court that he had made no representation whatsoever that withdrawal of the conscientious objector claim would affect in any manner petitioner's claim to exemption as a minister (R. 74), and that he assured petitioner it was immaterial to him whether or not he signed the statement (R. 100).

The divergent statements presented a question of credibility, and this question the trial court resolved against petitioner. It is beyond dispute that the trial court, which had the witnesses before it,

was best situated to decide such a factual question. *United States* v. *Johnson,* 327 U.S. 106; *United States* v. *Oregon State Medical Society,* 343 U.S. 326, 332.[3]

United States v. *Knight,* Crim. No. 20283, decided April 25, 1951 (N.D. Ohio) and *United States* v. *Stephens,* Crim. No. 20284, decided the same day in the same court, to which petitioner refers (Pet. 22-25), are plainly distinguishable. In both cases there was found to be at least an implicit representation that by withdrawing the conscientious objector claims the ministerial claims would be more sympathetically treated. This the court regarded as particularly damaging since the ministerial claims had already been disallowed by the appeal boards. In the present case, there had been neither such a final disallowance of the IV-D claim, nor, as the trial court found, was the withdrawal of the IV-E claim induced by any representation of more favorable treatment of the ministerial claim.[4]

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[3] Unlike the situation presented in *Davis* v. *United States,* petition for a writ of certiorari pending, No. 792, this Term, this petitioner did assert the claim of misrepresentation in the administrative process (*supra,* p. 8). He had thus exhausted his administrative remedies and the issue of whether he had been denied due process became an issue for the trial court.

[4] Section III of Department of Justice Circular No. 3461, printed in Appendix A of the Petition for a Writ of Certiorari (Pet. 55-60), instructs F.B.I. agents that, *inter alia,* if the registrant does not desire to sign a statement withdrawing his claim, no attempt should be made to persuade him to do so.

In January 1951, the regulations were changed to provide for determination of the claim to ministerial exemption before consideration of the conscientious objector claim and at the same time the F.B.I. agents were directed not to inquire whether the registrant wished to elect one of the two claims. See the Government's brief in opposition in *Davis* v. *United States,* No. 792, this term.

Petitioner, having freely withdrawn his conscientious objector claim, was not entitled to a conscientious objection hearing by the Department of Justice as provided by Section 6(j) of the Selective Service Act of 1948, 50 U.S.C. App., Supp. IV, 456(j), *supra*, pp. 2-3.

2. Petitioner was not improperly denied a personal appearance before his local board (Pet. 28-38). In order to be entitled to such an appearance it is essential that the registrant file a written request (32 C.F.R. 1624.1, *supra*, pp. 4-5). While petitioner argues that a letter he wrote to the local board December 12, 1950, constituted such a request, it seems clear that it was not. He stated therein that he would like to appeal his classification, and also that he would like to appear in person but was unable to do so because he was then living in Austin. He added that he would appreciate it if he could appear in person in Austin. *Supra*, p. 7. As petitioner concedes, "[u]nder the regulations it was impossible for the local board * * * to arrange for him to appear before a board in Austin" (Pet. 29), so that the letter did not state an effective request for a personal appearance. It was proper, therefore, for the board to regard the letter as a written request for reopening and consideration anew pursuant to Selective Service Regulations (32 C.F.R. 1625.2), and for an appeal. After voting against reopening, the board forwarded the file to the appeal board. Since petitioner had not been reclassified, the local board was under no obli-

gation to inform him of its action, as petitioner contends (Pet. 29) (see 32 C.F.R. 1625.12).

3. The local board did not improperly refuse to reopen and reconsider petitioner's case, as petitioner argues (Pet. 38-40). Selective Service Regulations (32 C.F.R. 1625.2, *supra*, p. 5) authorize local boards to reopen and consider anew the classification of a registrant on the basis of new facts, which, if true, would justify a change in his classification. However, when an order to report for induction has already issued, as was the case here,[5] the regulations (*ibid.*) provide that, prior to reopening, there must be a specific finding that the change resulted from circumstances over which the registrant had no control. At a hearing held for the purpose of determining whether or not to reopen petitioner's case, petitioner appeared and testified that he then devoted 300 hours a month to preaching (R. 54-58). Even assuming that this was true and that it represented a substantial increase over the extent of his ministerial work at the time his classification questionnaire was filed, it can hardly be contended that this change was one resulting from conditions beyond petitioner's control. The board's action in declining to reopen under such circumstances was, therefore, clearly in accordance with Selective Service Regulations.

4. Petitioner also contends that the local board's original rejection of his claim to ministerial exemp-

[5] An induction order was sent to petitioner on February 28, 1951, which was a week before the local board heard petitioner's account of his changed status and decided not to reopen the case (*supra*, p. 9) (R. 27).

tion was arbitrary and capricious. However, it is firmly establshed that so long as there was a basis in fact in the file for finding that petitioner was not a minister within the terms of the Selective Service Act of 1948, Section 6(g), 50 U.S.C. App., Supp. IV, 456(g), the board's action is conclusive and may not be disturbed by the courts. *Cox* v. *United States,* 332 U.S. 442; *Estep* v. *United States,* 327 U.S. 114. Section 16(g)(3) of the Act, 50 U.S.C. App., Supp. IV, 466(g)(3), states that "[t]he term 'regular or duly ordained minister of religion' * * * does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but *who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization*" [emphasis supplied]. In light of this provision, the fact that petitioner stated in his classification questionnaire that he was a porter and a truck driver at a laundry and that he had worked at that trade for two years is enough to sustain the board's action (R. 63). In addition, the board was entitled to consider petitioner's youth (R. 62), his slight education (R. 61), the brevity of his training for the ministry (R. 63), and the fact that while authorized to perform marriage ceremonies he had only done so on one occasion (R. 68). The case for rejecting the ministerial claim is at least as strong as in the case of petitioner Cox in *Cox* v. *United States, supra,* who had pre-

sented evidence that he was a duly ordained minister of the gospel, that his entire time was devoted to missionary work, and that he preached from house to house and conducted funerals.

5. Petitioner's final contention is that the trial court erred in not ordering production of the official report made by the F.B.I. agent after he had taken petitioner's statement withdrawing his conscientious objector claim (Pet. 49-53). However, it is well settled that production of documents relating to a witness' testimony is a subject for the discretion of the trial judge, particularly when, as here, they are not used in court. *Goldman* v. *United States* 316 U.S. 129, 132; *United States* v. *Socony-Vacuum Co.,* 310 U.S. 150, 231-237; *Lennon* v. *United States,* 20 F. 2d 490, 493 (C.A. 8). That discretion may be abused, as where production and inspection of admittedly contradictory prior statements by key witnesses on importantly relevant matters are refused. *United States* v. *Krulewitch,* 145 F. 2d 76 (C.A. 2); *Gordon* v. *United States,* 344 U.S. 414. But that is not the case presented here, since the agent on cross-examination repeatedly denied that the report in question contained anything of significance other than petitioner's statement of waiver which was already in evidence. This is a patently different situation from that found in the *Gordon* case, *supra,* where, as this Court observed (344 U.S. at 418-419):

> By proper cross-examination, defense counsel laid a foundation for his demand by showing that the documents * * * were made

> by the Government's witness under examination, were contradictory of his present testimony, and that the contradiction was as to relevant, important and material matters which directly bore on the main issue being tried * * * The demand was for production of these specific documents and did not propose any broad or blind fishing expedition among documents possessed by the Government on the chance that something impeaching might turn up.

Here, counsel for petitioner stated that if the report were produced "I may be able to impeach this witness" (R. 89), but was unable to specify how this would be done. Full cross-examination of the agent was permitted, and the trial court, in the exercise of its discretion to control the extent of cross-examination, *Glasser* v. *United States,* 315 U.S. 60, 83, properly refused a request for production that was based on nothing more than the mere possibility that "something impeaching might turn up" (344 U.S. at 419).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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JUNE 1953.

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SUPREME COURT OF THE UNITED STATES

No. 5 ORIGINAL.—OCTOBER TERM, 1952.

THE STATE OF NEBRASKA, Complainant,

v.

THE STATE OF WYOMING, Defendant,

and

THE STATE OF COLORADO, Impleaded Defendant,
THE UNITED STATES OF AMERICA, Intervener.

Order Modifying and Supplementing Decree of October 8, 1945.

[June 15, 1953.]

The parties to this cause having filed a stipulation, dated January 14, 1953, and a joint motion for approval of the stipulation and to modify and supplement the decree entered on October 8, 1945 (325 U. S. 665) and the Court being fully advised:

The stipulation dated January 14, 1953, is approved; and

IT IS ORDERED that the decree of October 8, 1945, is hereby modified and supplemented as follows:

1. In paragraph I (a) of the decree the figure "145,000" is substituted for the figure "135,000."

2. Paragraph XIII is amended by striking the first sentence and substituting for it the following:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief, except

that for a period of five years from and after [the date of the entry of this order to be inserted by the Court] the State of Colorado shall not institute any proceedings for the amendment of the decree or for further relief. In the event that within said period of five years any other party applies for an amendment of the decree or for further relief, then the State of Colorado may assert any and all rights, claims or defenses available to it under the decree as amended.

3. Two new paragraphs, as follows, are added to the decree:

XVI. Whatever claims or defenses the parties or any of them may have in respect to the application, interpretation or construction of the Act of August 9, 1937 (50 Stat. 564–595) shall be determined without prejudice to any party arising because of any development of the Kendrick Project occurring subsequent to October 1, 1951.

XVII. When the Glendo Dam and Reservoir are constructed, the following provisions shall be effective:

(a) The construction and operation of the Glendo Project shall not impose any demand on areas at or above Seminoe Reservoir which will prejudice any rights that the States of Colorado or Wyoming might have to secure a modification of the decree permitting an expansion of water uses in the natural basin of the North Platte River in Colorado or above Seminoe Reservoir in Wyoming.

(b) The construction and operation of Glendo Reservoir shall not affect the regimen of the natural flow of the North Platte River above Pathfinder Dam. The regimen of the natural flow of the North Platte River below Pathfinder Dam shall not be changed, except that not more than 40,000 acre feet of the natural flow of the North Platte River and its tribu-

taries which cannot be stored in upstream reservoirs under the provisions of this decree may be stored in the Glendo Reservoir during any water year, in addition to evaporation losses on such storage, and, further, the amount of such storage water that may be held in storage at any one time, including carryover storage, shall never exceed 100,000 acre feet. Such storage water shall be disposed of in accordance with contracts to be hereafter executed, and it may be used for the irrigation of lands in the basin of the North Platte River in western Nebraska to the extent of 25,000 acre feet annually, and for the irrigation of lands in the basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir to the extent of 15,000 acre feet annually, provided that it shall not be used as a substitute for storage water contracted for under any existing permanent arrangements. The above limitation on storage of natural flow does not apply to flood water which may be temporarily stored in any capacity allocated for flood control in the Glendo Reservoir, nor to water originally stored in Pathfinder Reservoir which may be temporarily re-stored in Glendo Reservoir after its release from Pathfinder and before its delivery pursuant to contract; nor to water which may be impounded behind Glendo Dam, as provided in the Bureau of Reclamation Definite Plan Report for the Glendo Unit dated December 1952, for the purpose of creating a head for the development of water power.

(c) Paragraph III of the decree is amended to read as follows:

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs otherwise than in ac-

cordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;

Second, Guernsey Reservoir;

Third, Seminoe Reservoir;

Fourth, Alcova Reservoir; and

Fifth, Glendo Reservoir;

Provided, however that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals.

Storage rights of Glendo Reservoir shall be subject to the provisions of this paragraph III.

(d) Paragraph IV of the decree is amended to read as follows:

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said five reservoirs and said Casper Canal, and which said Nebraska

appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	Canal	Limitation in Sec. Feet	Seasonal Limitation in Acre Ft.
Tract of 1025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

(e) Paragraph V of the decree is amended to read as follows:

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and

transportation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A and the stipulation of the parties dated January 14, 1953, and filed on January 30, 1953:

Reservoir Evaporation Losses.

Seminoe, Pathfinder and Alcova Reservoirs.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder Reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of 70% to reduce pan record to open water surface.

Glendo and Guernsey Reservoirs.

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder reservoir for the period 1921 to 1939, inclusive, using a co-efficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	Area Acres	Daily Loss—Second Feet May	June	July	Aug.	Sept.
Alcova to Glendo Reservoir	6,740	43	61	70	61	45
Guernsey Reservoir to Whalen	560	4	5	6	5	4
Whalen to State Line	2,430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Glendo Dam to head of Guernsey Reservoir (area 680 acres) because this area is less than submerged area of original river bed (940 acres) in Glendo Reservoir and is, therefore, considered as off-set.

Above table does not contain computed loss for section of river from Pathfinder Dam to head of Alcova Reservoir (area 170 acres) because this area is less than submerged area of original river bed in Alcova Reservoir and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder Reservoir—considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agree-

ment, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.